No. 18680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. Bomb,

Appellant,

vs.

Coastside Mills, Inc.,

Appellee.

APPELLANT'S OPENING BRIEF.

William J. Tiernan,
215 West Seventh Street,
Los Angeles 14, California,
Attorney for the Appellant.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-0171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Rules

Statutes

Textbooks

No. 18680

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

A. J. BUMB,

Appellant,

vs.

BONAFIDE MILLS, INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Basis.

This is an appeal from a final judgment made and entered in the United States District Court for the Southern District of California, Central Division, and this appeal is prosecuted in accordance with the provisions of Rule 72 *et sequitur* of the Federal Rules of Civil Procedure.

On July 3, 1962, the Appellant filed his application for a Temporary Restraining Order, Permanent Injunction, Reasonable Attorney's Fees, etc. [Clk. Tr. p. 226.] The Court issued an immediate Order to Show Cause and a Temporary Restraining Order and set the matter down for hearing upon the allegations of the Application of the Appellant. [Clk. Tr. p. 234.]

The Appellee, Bonafide Mills, Inc., filed its response to the Application. [Clk. Tr. p. 236.] After a hearing the Referee in Bankruptcy made his Findings of Fact, Conclusions of Law and Order on September 12, 1962, by the terms of which, he issued a Permanent Injunc-

tion barring the Appellee, Bonafide Mills, Inc., from pursuing a certain action in the State Courts of the State of California. [Clk. Tr. p. 239.] The injunction was subsequently amended by an Amended Order of Injunction on September 20, 1962. [Clk. Tr. p. 244.]

The Appellee, Bonafide Mills, Inc., filed a Petition for Review on September 27, 1962, for a hearing before the United States District Court and to review the order of injunction of the Referee. [Clk. Tr. p. 245.] A hearing was held before the United States District Judge and he issued a Memorandum of Decision on March 21, 1963, which was entered on March 22, 1963. [Clk. Tr. pp. 256 and 270.] Notice of Appeal was filed by Appellant on April 19, 1963 to the above-entitled Honorable Court. [Clk. Tr. p. 271.]

Statement of the Case.

The pertinent facts in this matter may be summarized as follows:

On July 13, 1959, bankruptcy proceedings were commenced in the Southern District of California against one, R. M. Hacker, by creditors' filing of an Involuntary Petition in Bankruptcy. On July 14, 1959, A. J. Bumb was appointed Receiver to take custody of the assets of the Alleged Bankrupt. The Receiver's authority was limited to that of a custodian and he was not authorized to, nor did he, conduct the business of the Alleged Bankrupt.

Prior to the filing of Involuntary Bankruptcy Proceedings, the Alleged Bankrupt had executed a general assignment for the benefit of creditors on or about July 7, 1959 to one, M. W. Engelman, as Assignee. [Clk. Tr. p. 147.]

On September 15, 1959, the Appellee, Bonafide Mills, Inc., filed a claim in the pending bankruptcy proceed-

ings for the recovery of $8,226.58 based upon goods shipped to the bankrupt on consignment and subsequently sold by said bankrupt.

On October 1, 1959, the Appellee, Bonafide Mills, Inc., filed a Petition in Reclamation in the bankruptcy proceedings [Clk. Tr. p. 52] seeking recovery of a quantity of merchandise from the Debtor, R. M. Hacker, and/or A. J. Bumb, Receiver, allegedly sold and delivered on a consignment basis.

The Petition in Reclamation named the debtor, R. M. Hacker, as well as the Receiver, A. J. Bumb, as parties.

Subsequently, on October 31, 1960, a Stipulation for the withdrawal of the aforesaid Petition in Reclamation and to fix the amount of the claim of Bonafide Mills, Inc. and for a return of certain merchandise was entered into between the Appellee, Bonafide Mills, Inc. and the attorneys for the Debtor, R. M. Hacker. [Clk. Tr. p. 193.] The Receiver and his attorney of Record were not a party to this Stipulation and did not execute it, although the Stipulation was subsequently approved by the Referee in Bankruptcy.

This Stipulation increased the general claim of the Appellee, Bonafide Mills, Inc., on file from $8,226.58 to $27,590.39 an increase of $16,578.98.

In the course of the administration of the bankruptcy proceedings, the Alleged Bankrupt, R. M. Hacker, filed a Plan of Arrangement under Chapter XI for a composition or general settlement with his creditors paying them a partial dividend in satisfaction of their claims. The dividend was paid about March 27, 1961 to the approved creditors in the approximate amount of

twenty-seven and one-half percent (27½%). [Clk. Tr. p. 209.] This included a dividend to the Appellee Bonafide Mills, Inc., upon its increased claim of $27,590.39. [Clk. Tr. p. 216.]

Upon payment of these general dividends and upon approval of the Report and Account of the Receiver, A. J. Bumb, the case was closed; the proceedings dismissed; the Receiver's authority terminated and his bond exonerated. [Clk. Tr. pp. 223, 224 and 225.]

On June 22, 1961, Bonafide Mills, Inc. filed an action-at-law in the Superior Court in and for the County of Los Angeles, State of California, naming the Receiver, A. J. Bumb, and the general Assignee for the benefit of creditors, M. W. Engelman, as Defendants in four (4) counts. The Complaint, a copy of which was received in evidence by the Referee in Bankruptcy, the gist of which is referred to in the Memorandum Decision of the United States District Judge on page 5 of his Memorandum Decision [Clk. Tr. p. 260], generally, speaking, seeks recovery of merchandise or its value in the amount of $16,578.98 allegedly taken in possession by either the Defendant, M. W. Engelman or A. J. Bumb, Appellant.

In July of 1962, the entire bankruptcy proceedings were re-opened upon the application of A. J. Bumb as Receiver. On July 3, 1962, Appellant, A. J. Bumb, filed his Application for a Temporary Restraining Order for a Permanent Injunction; for Reasonable Attorney's Fees and other relief. [Clk. Tr. p. 226.] Upon the strength of the allegations of this Application, an Order to Show Cause, Temporary Restraining Order and and Order for a Hearing were made and entered by the Referee in Bankruptcy. [Clk. Tr. p. 234.]

Bonafide Mills, Inc. filed its Response to the Application of A. J. Bumb, but did not reserve the jurisdictional question nor interpose an objection to the summary jurisdiction of Court by either its response or by a motion filed before the time prescribed by the Referee for filing its answer. [Clk. Tr. p. 236.]

The hearing was held and upon the conclusion of the hearing, the Court made Findings of Fact, Conclusions of Law and an Order on September 12, 1962, by the terms of which a permanent injunction was issued enjoining the proceedings in the Superior Court for Los Angeles County. [Clk. Tr. p. 239.] This Order was subsequently amended by the Referee on September 20, 1962 at the request of Bonafide Mills, Inc. [Clk. Tr. p. 244.]

It is to be noted that the Order of the Referee in Bankruptcy does not prevent Bonafide Mills, Inc. from pursuing a cause of action or claim against the Receiver. It merely prescribes that Bonafide Mills, Inc. must press or process its claims before the Court which appointed the Receiver, to wit, the Bankruptcy Court.

Within the time prescribed by law, the Appellee, Bonafide Mills, Inc. filed its Petition for Review on September 27, 1962. [Clk. Tr. p. 245.] The Referee certified the facts to the United States District Court on October 15, 1962. [Clk. Tr. p. 254.] It is to be noted that the sole question as set forth in the Referee's Certificate is whether or not the Referee in Bankruptcy had the jurisdiction to make and issue the injunction complained of by the Appellee.

The District Court, in a fairly lengthy opinion, reversed the Order of the Referee in Bankruptcy from which this Appeal has been prosecuted.

POINT ONE.

The Referee Had Jurisdiction by Consent of Appellee to Issue an Injunction.

To begin, with, the proceedings were commenced before the Referee by the filing of the Application for a Temporary Restraining Order and a Permanent Injunction. The Temporary Restraining Order was issued and a hearing was held upon whether or not such should become permanent. The Appellee, it is to be noted, filed his Response a copy of which has been forwarded by the Referee with his Certificate. The Response, it is noted, goes to the merits of the controversy and does not include an objection to the jurisdiction of the Court. No prior objection or motion was ever made and at the outset, it would appear that the Appellee consented to the jurisdiction of the Bankruptcy Court to hear the matter on its merits. *Section 2a(7) of the Bankruptcy Act (11 U. S. C. Section 11)* provides as follows:

> "Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided, and determine and liquidate all inchoate or vested interests of the bankrupt's spouse in the property of any estate whenever, under the applicable laws of the State, creditors are empowered to compel such spouse to accept a money satisfaction for such interest; *and where in a controversy arising in a proceeding under this Act an adverse party does not interpose objection to the summary jurisdiction of the court of bankruptcy, by answer or motion filed before the expiration of the time prescribed by law or rule of court or fixed*

or extended by order of court for the filing of an answer to the petition, motion or other pleading to which he is adverse, he shall be deemed to have consented to such jurisdiction;"

Comment is made upon the foregoing. *In Volume I, Collier on Bankruptcy, 14th Edition, Supplement (1961), page 27* as follows:

"Section 2a (7) was amended in 1952 by the addition of a provision to the effect that an adverse party is deemed to have consented to the summary jurisdiction of the court unless there is timely interposition of an objection to the jurisdiction of the court. In effect this amendment overrules the case of Cline v. Kaplan (1944) 323 U. S. 97, discussed in the Treatise in 23.08 (Vol. 2). The amendment was made to Section 2a (7) rather than to Section 23, so that it would apply to all sections of the Bankruptcy Act, including the debtor relief provisions."

POINT TWO.

By Entering the Bankruptcy Court With a Proof of Claim, a Petition in Reclamation and by Participating in Its Dividends the Appellee Selected and Approved a Forum to Deal With All Aspects of His Claims.

But the express consent to jurisdiction goes far beyond the failure to assert the lack of jurisdiction by timely motion in Act.

By entering the Bankruptcy Court with a request for relief, by the filing of a Petition in Reclamation, as well as by the filing of a general claim, the execution of stipulations, the Appellee creditor here has selected a

forum and entered the jurisdiction thereof for all purposes, including but not limited to the subject matter of his claim, defenses and off-sets thereto and other matters affecting the substance in the same subject matter. In other words, the Appellee filed a Petition in Reclamation to recover property. Appellee filed well general claim for that property which he allegedly did not receive or recover and this claim was allowed by the Referee and participated with the other creditors in a dividend from the estate. The same matters which are the subject of his claim and his Petition is Reclamation were embodied in a suit against the Receiver filed in the Superior Courts. The Referee found the same suject matter to be involved.

Under these circumstances and in addition to the foregoing arguments, Appellee has conferred jurisdiction upon the Referee in Bankruptcy for all matters, including if you will, counter-claims should it be the desire of third persons connected with the bankruptcy estate to file such. This has not been done, but under the cases it is possible. The filing of a general, unsecured claim in a Bankruptcy proceeding confers jurisdiction upon the Referee to hear all matters related there to and to render affirmative judgments. See the cases of *Interstate National Bank of Kansas City v. Luther* (C. A. 10), 221 F. 2d 382. See *In re Solar Manufacturing Corporation* (C. A. 3), 200 F. 2d 327. See *Columbia Foundry v. Lockner* (C. A. 4), 179 F. 2d 630. See also *Chase National Bank v. Lyford* (C. A. 2), 147 F. 2d 273.

A leading case in this District, and one cited throughout the length and breadth of Bankruptcy decisions on this question is the opinion of Judge Mathes, written in the matter of *In re Nathan* (S. D. Cal.), 98 F. Supp. 686, where Judge Mathes quoted from the Supreme Court at *page 692,* as follows:

> "As Mr. Justice Douglas put it in Case v. Los Angeles Lumber Products Co., 1939, 308 U.S. 106, 126-127, 60 S. Ct. 1, 12, 84 L. Ed. 110: 'And once the jurisdiction of the court has been voked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages which may flow to him as a consequence, as well as gaining all of the benefits.' See also May v. Henderson, 1925, 268 U. S. 111, 116-118, 45 S. Ct. 456, 69 L. Ed. 870; In re International Power Securities Corp., 3 Cir., 1948, 170 F. 2d 399, 402, 405-406; Bank of California v. McBride, 9 Cir., 1943, 132 F. 2d 769, 772; Floro Realey & Investment Co. v. Steem Electric Corp., 8 Cir., 1942, 128 F. 2d 338, 340-341; In re Gillespie Tire Co., D. C. W. D. Car. 1942, 54 F. Supp. 336, 338-341."

The rule in the *Nathan* case is not only a rule of law but a rule of good reason. It has been adopted by leading authorities on Bankruptcy to the effect that where a party first seeks relief in the Bankruptcy Court, his subsequent suit in a State Court against the Re-

ceiver in his individual capacity may be enjoined. See *Collier on Bankruptcy, Volume I, Section 2.30, footnote 4 at page 225.*

A similar situation occurred in the *Matter of Green,* 20 A.B.R. (N. S.) 536, 58 F. 2d 807 (S. D. N. Y. 1932). In this case, a Receiver in a Bankruptcy matter enjoined the prosecution of a State action against him individually. The plaintiff had appeared in the Bankruptcy proceedings prior to the filing of the State Court action and by motion, sought to have the Receiver turn over certain property which he claimed to be his. The plaintiff's motion was denied when it was found that his affidavits were insufficient. Thereafter, the plaintiff filed a State Court action suing the Receiver in his individual capacity. In granting the injunction against the State Court action, the District Court held,

> "It is held that Abramson's choice was deliberate, informed, and calculated to result in an adjuciation upon the merits. It is thought that the attempt now to evade the consequences of that application is not compatible with the fair respect for the court to which it was presented."

The *Green* case has been cited with approval in the matter of *In re Trayna and Cohn,* 195 Fed. 486 (C.A. 2, 1912), *27 A. B. R. 594.* In this case, the Receiver petitioned the Court for permission to sell property of the bankrupt, subject to certain liens, among them a chattel mortgage held by the plaintiff.

The property was sold and a trust resulted in the funds more than sufficient to pay the amount of the mortgage. This still did not satisfy the plaintiff mortgage holder. The hearing was held to determine the validity of his mortgage and he failed to appear. Thereafter, he sued the Receiver in his individual capacity, charging him with conversion. The Court decided that the controversy between the plaintiff was one that should be heard and determined in the Bankruptcy Court. The Circuit Court of Appeals stated as follows:

> "By not objecting to the sale and by himself invoking the jurisdiction of the Bankruptcy Court, he ratified the sale free of liens and conferred authority upon the court to adjudicate the validity of his mortgage. The Receiver relied and had a right to rely upon these actions of the petitioner and shaped his course accordingly. Had he known that the petitioner intended to hold him in trover, he very likely would not have done the acts of which the alleged conversion is predicated. In any view, he had a right to rely upon the question being determined and the tribunal whose jurisdiction the petitioner had invoked. Having by tacit consent in affirmative action induced the Receiver to join issue with him in the Bankruptcy Court, the petitioner should not be permitted to remove the controversy to a tribunal which he may think more favorable to his contentions."

POINT THREE.

The Referee in Bankruptcy Had Abundant Authority to Issue the Injunction in Question.

The next question, if it could be considered a question at all, is whether or not a Bankruptcy Referee has authority to issue an injunction under these circumstances.

It is generally conceded that the authority of a Referee in Bankruptcy to issue an injunction resides in *Section 2a(15) of the Bankruptcy Act (11 U. S. C. Section 11),* which provides as follows:

> "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: PROVIDED, HOWEVER, That an injunction to restrain a court may be issued by the judge only;"

It has been affirmatively held that this particular Section is broad enough to cover the issuance of temporary restraining orders, injunctions and the like and in fact, an excellent discussion of this authority is contained in a recent case, In the Matter of *In re Lustron Corporation* (C. A. 7, 1950), 184 F. 2d 789, cert. den. 340 U. S. 946.

The general treatment of the proposition that the Bankruptcy Court may issue injunctions, temporary restraining order and the like under *Section 2 of the Bankruptcy Act,* may be found in *Section 3579 of Remington on Bankruptcy, Volume 9* thereof, and in *Collier on Bankruptcy, Volume I* thereof, *Section 2.64 commencing at page 337.* See *Matter of Sterling* (C. C. A. 9, 1942), 48 A. B. R. (N. S.) 468; 125 F. 2d 104.

See also the case of *In re Matter of California Pea Products, Inc.* (Southern District of California, 1941), 45 A. B. R. (N. S.) 393; 37 F. Supp. 658, *which was an opinion decided by Judge Paul McCormick formerly of this District.*

Judge McCormick went on to say:

> "Section 2(15) of the Bankruptcy Act empowered the referee to 'make such orders, issue such process, and enter such judgments, . . . as may be necessary for the enforcement of the provisions of this title, (act); provided, however, that an injunction to restrain a court may be issued by the judge only.' This statute, as well as General Order 12, effective February 13, 1939, is a rule of procedure relating to the remedy and is applicable to this bankruptcy matter and, particularly, to the injunction herein which was issued March 22, 1940. And in arriving at the extent of power that is conferred upon the referee by section 2(15), the concluding clause of the subsection is a clear investiture in the refereee under a general reference to issue all injunctions in the course of the bankruptcy proceeding necessary to prevent the defeat or impairment of his jurisdiction except that only a judge can enjoin a court. It would have been a simple matter for Congress to have made the prohibition against the referee's power to issue injunctions general if such had been the legislative intent. As no such intent appears but, on the contrary, only a single specific prohibition being shown, the referee is in all other instances vested with plenary judicial power to issue stay orders when acting under a general reference."

POINT FOUR.

The Referee Clearly Acted Within the Reasonable Limits of His Discretion.

The only and final question which can occur to the writer is whether the Court in the making and issuance of this injunction abused its discretion. It is well to call in mind at this time, the fact that the injunction does not prohibit or prevent the creditor here from having a full, fair and final complete hearing upon whatever claim it may assess. It only prevents this creditor from asserting that claim in a foreign or alien jurisdiction.

To begin with, General Order 47 promulgated in connection with the Bankruptcy Act, provides that, "The findings of fact etc. issued by a referee or special master shall not be disturbed unless they are clearly erroneous."

This rule has been adopted in connection with the findings of refrees in this district in the matter of *Ott v. Thurston* (C. A. 9), 29 A. B. R. (N. S.) 576; 76 F. 2d 368, wherein the court said at page 369:

> "Another error stressed by the appellant is that the judge of the district court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the district court stated in its opinion: 'The evidence was at least conflicting, the district court is not at liberty to disregard the referee's finding if they find sufficient support in the evidence.' The court was here expressing the general rule of practice on review or appeal.
>
> "It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on

review of the decision of a referee, based upon his conclusions on questions of fact, *the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court.*"

There are several other cases in this District holding the issuance of a temporary restraining order or an injunction to be well within the proper exercise of the referee's authority. See the cases of *Bakersfield Abstract Company v. Buckley* (C. A. 9), 100 F. 2d 530; in the case of *In re Jersey Island Packing Company* (C. A. 9, 1905), 14 A. B. R. 689; 138 Fed. 625.

POINT FIVE.

The Opinion of the District Judge Supports the Position of Appellant and Contains Findings Which Are Themselves Valid Reasons for the Issuance of a Permanent Injunction.

The opinion written by the learned United States District Judge must be read in its entirety.

Appellant wishes to point out the language of the opinion commencing on page 7, line 24 [Clk. Tr. p. 262 through and including line 18 on p. 8; Clk. Tr. p. 263] which reads as follows:

> "In amending its claim to include the value of the goods which were unaccountably missing, Bonafide represented to the Bankruptcy Court, under oath, that the shortage existed on July 13, 1959, the day of filing the involuntary petition, and that on that day the bankrupt debtor was indebted to Bonafide for their value in the amount stated. Such a claim could have been based upon the Consignment

Agreement provision that the consignee should be responsible for all merchandise not accounted for. The proof of this claim was such as to satisfy the Referee and the claim was allowed. Bonafide invoked the jurisdiction of the Bankruptcy Court for this purpose and thereby submitted to its jurisdiction to try all matters affecting the validity of such claim, including the verity of the representation that said claim had accured on or before July 13, 1959.

The receiver was appointed on July 14, 1959, and in his official capacity as reciever had nothing to do with any of the goods consigned by Bonafide to the debtor before that date. If the loss of the goods had occurred by July 13, 1959, the receiver could not be responsible for their loss. Moreover, if the loss occurred after July 13, 1959, Bonafide's claim and the representations in support thereof were erroneous or false. Jurisdiction to determine whether they were true or false belonged exclusively to the Bankruptcy Court. The Bankruptcy Court exercised this jurisdiction and settled the issue by allowing the claim."

In addition, the United States District Judge wrote as follows on page 9, lines 15 through 21 of his opinion [Clk. Tr. p. 264].

"These claims are in obvious and direct conflict with Bonafide's allowed claim. It appears to be an attempt at piecemeal litigation of a single cause of action. The receiver argues with considerable persuasion in his application for injunction that any action against him should be barred by res judicata and by laches in light of his substantial and prejudicial change of position."

It is most respectfully suggested that the final decision of the United States District Judge is based upon a narrowly isolated concept revolving around the question of whether or not certain property actually or impliedly found its way into the possession or constructive possession of the Receiver or the Court so as to be *in custodia legis.*

This is a new and confining limitation on bankruptcy jurisdiction, although as the undersigned reads the opinion of the Court, it seems to imply that in fact, the Referee did have jurisdiction but that the Court ought to relinquish this jurisdiction to the state courts in order to accomplish the ends of justice.

It would appear to the undersigned that this decision was one which was properly vested in the Referee in Bankruptcy in charge of the case. The Referee's findings and Conclusions and Order ought not to have been disturbed by the District Court.

One further remark concerning the opinion of the United States District Judge should be made in this Brief. The District Judge consistently refers to A. J. Bumb as Receiver and "Trustee" in the Hacker Bankruptcy proceedings. [See pp. 1 and 2 of the Memorandum Opinion of the United States District Judge; Clk. Tr. pp. 256 and 257.]

Nowhere in the record is there any order appointing A. J. Bumb Trustee and this order was specifically requested if any such existed by the undersigned as counsel for the Appellant in connection with the preparation of the Clerk's Transcript. [Clk. Tr. p. 278.] No such order has ever been made part of the record on appeal for the reason that it is believed that none exists.

It is undisputed that A. J. Bumb acted as a mere custodian and did not operate the business of the debtor. The Referee in Bankruptcy so found in Findings of Fact No. 1 [Clk. Tr. p. 240] and the United States District Judge, on page 2 of his Memorandum Decision evidently agreed. [Clk. Tr. p. 257.]

> "On July 13, 1959, an involuntary petition in bankruptcy was filed against the debtor. A. J. Bumb was appointed receiver and became custodian of the assets of the bankrupt on July 14, 1959."

It appears to the undersigned that it is established law by statute and by cases to the effect that a receiver acting as a mere custodian and *not carrying on the business of the debtor* cannot be sued other than in the court of his appointment without the consent of such court. *28 United States Code, Section 959, subdivision(a)* says as follows:

> "(a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions *in carrying on business connected with such property.* Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury." (Italics supplied.)

While this statute has been quoted by the United States District Judge in his Memorandum Opinion, it is believed by the undersigned that he absolutely misunderstood the implications of the phrase "in carrying on business connected with such property."

A leading case concerning the question of consent and carrying on business is the matter of *Alfred E. Vass, Trustee v. Conron Brothers Co.* (C. A. 2d, 1932), 59 F. 2d 969, an excellent opinion by Learned Hand, Circuit Judge.

This opinion points out the reasoning behind this rule of law. It appears to the undersigned to be most apropos the instant situation.

It is not disputed that the consent of the Bankruptcy Court has never been received insofar as filing an action in the Superior Court by the Appellee is concerned. It seems that such consent far from being given, has been withheld by the issuance of the injunction here under attack.

The matter has been discussed recently in the case of *In re California Eastern Airways, Inc.* (D. C. Del., 1951), 95 F. Supp. 348.

The statute and the reasoning is applicable to trustees in bankruptcy and is applicable as well to receivers.

For the reasons set forth in this Brief, it is respectfully submitted that the opinion of the United States District Judge is erroneous and should be reversed and the order granting a permanent injunction made and entered by the Referee in Bankruptcy should be affirmed and adopted as the rule of this Court.

Dated: This 29th day of August, 1963.

Respectfully submitted,

WILLIAM J. TIERNAN,
Attorney for the Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examained Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William J. Tiernan